Jisly D Tabad & Anor v Semon bin Sandaang @ Sandaan & Anor

HIGH COURT (KOTA KINABALU) — ADOPTION APPLICATION NO K34–20 OF 2009
STEPHEN CHUNG JC
7 SEPTEMBER 2010

Civil Procedure — Jurisdiction — Challenge to jurisdiction — Estopple — Applicants attending adoption proceedings before Native Court according to native law and customs — Whether order of Native Court complied with — Whether applicants estopped from denying jurisdiction and power of Native Court to adjudicate on matter

Constitutional Law — Courts — Jurisdiction — Native Court — Jurisdiction of Sabah Native Court to hear and determine matters regarding adoption and custody of child — Sabah Native Courts Enactments

Family Law — Children — Adoption — Jurisdiction of Sabah Native Court to hear and determine matters regarding adoption and custody of child — Sabah Native Courts Enactments

Family Law — Children — Adoption — Natural parents objecting to adoption application and seeking return of child — Child given up for adoption pursuant to Sabah native customs — Whether adoptive parents' adoption application to be allowed — Whether welfare of child paramount consideration — Social report by Welfare Department and child psychiatrist report leaning in favour of child to be returned to natural parents

The applicants who were childless wished to adopt a child. The respondents had agreed to give up their fifth child to the applicants for adoption. The child was given up to the applicants for adoption on 11 March 2006 pursuant to native customs. The adoption ceremony was carried out according to native customs. Since then the applicants had raised the child as their own. However, two weeks after giving up the child for adoption, the respondents began to ask for the return of the child. The respondents referred the matter to the Native Court at Tamparuli which heard their application in the presence of both parties. The Court ordered that the child be returned to the respondents. The appellants accordingly returned the child and filed this application to adopt the child pursuant to s 10 of the Sabah Adoption Ordinance. The respondents

opposed the application. The applicants claimed that the Native Court had no jurisdiction to hear and decide on the respondents' application for the return of the child. The respondents claimed that the applicants were estopped from denying the juridistion of the Native Court since the applicants did not appeal against the decision of the Native Court but had returned the child to the respondents as ordered.

Held, dismissing the application with no order as to costs:

(1) The first applicant and the respondents were natives of Sabah. The child was a native of Sabah. The Native Court thus had the jurisdiction and power to hear and determine the adoption and custody of the child under the Sabah Native Courts Enactments 1992 (see para 8).

(2) The applicants and the respondents having attended the adoption before the Ketua Kampung and having attended the hearing in the Native Court at Tamparuli according to native law or customs, were estopped from denying the jurisdiction and power of the Native Court to adjudicate on the matters in accordance to native law or customs (see para 8).

(3) In an application for adoption where there are conflicting claims, the court is not concerned with the interests of the parties. The paramount consideration is the welfare of the child (see para 10).

(4) The child psychiatrist report concluded that on the assessment done, that was after nine months of living with his biological family, there was no indication that the child was in distress or traumatised as he was developing normally both physically and psychologically.There was no major behavioral problem like nightmares, bedwettings or behavioural problem; the common presentations when a child is in distress (see para 18).

(5) Having considered the social report prepared by the Welfare Department and the child psychiatrist report, it was for the welfare of the child that he remained with his biological parents and siblings (see para 19).

[Bahasa Malaysia summary

Pemohon-pemohon yang tidak mempunyai anak berharap untuk mengambil anak angkat. Responden-responden telah bersetuju untuk melepaskan anak kelima mereka kepada pemohon-pemohon untuk diambil sebagai anak angkat. Kanak-kanak tersebut dilepaskan kepada pemohn-pemohon untuk diambil sebagai anak angkat pada 11 Mac 2006 berikutan adat anak negeri. Majlis pengambilan anak angkat telah dijalankan mengikut adat anak negeri. Semenjak itu pemohon-pemohon membesarkan kanak-kanak tersebut sebagai anak mereka sendiri. Walau bagaimanapun dua minggu selepas melepaskan anak mereka untuk diambil sebagai anak angkat, responden-responden mula memohon supaya kanak-kanak tersebut dipulangkan. Responden-responden

merujuk perkara tersebut di Mahkamah Anak Negeri di Tamparuli yang mendengar permohonan mereka di hadapan kedua-dua pihak. Mahkamah memerintah bahawa kanak-kanak tersebut dipulangkan kepada responden-responden. Perayu-perayu oleh itu memulangkan kanak-kanak tersebut dan memfailkan permohonan ini untuk mengambil anak tersebut sebagai anak angkat berikutan s 10 Ordinan Pengangkatan Sabah. Responden-responden menentang permohonan tersebut. Pemohon-pemohon mendakwa bahawa Mahkamah Anak Negeri tidak mempunyai bidang kuasa untuk mendengar dan memutuskan atas permohonan responden-responden untuk pemulangan kanak-kanak tersebut. Responden-responden mendakwa bahawa pemohon-pemohon diestop daripada menafikan bidang kuasa Mahkamah Anak Negeri memandangkan pemohon-pemohon tidak merayu terhadap keputusan Mahkamah Anak Negeri tetapi memulangkan kanak-kanak tersebut kepada responden-responden seperti diperintahkan.

Diputuskan, menolak permohonan tanpa perintah untuk kos:

(1) Pemohon pertama dan responden-responden adalah anak negeri Sabah. Kanak-kanak tersebut adalah anak negeri Sabah. Mahkamah Anak Negeri oleh itu mempunyai bidang kuasa dan kuasa untuk mendengar dan menentukan pengambilan anak angkat dan penjagaan kanak-kanak tersebut di bawah Enakmen Mahkamah Anak Negeri Sabah (lihat perenggan 8).

(2) Pemohon-pemohon dan responden-responden setelah menghadiri pengambilan anak angkat di hadapan Ketua Kampung dan menghadiri pendengaran di Mahkamah Anak Negeri di Tamparuli mengikut undang-undang anak negeri atau adat, diestop daripada menafikan bidang kuasa dan kuasa Mahkamah Anak Negeri untuk menghakimi perkara-perkara mengikut undang-undang anak negeri atau adat (lihat perenggan 8).

(3) Di dalam permohonan untuk pengambilan anak angkat di mana terdapat tuntutan yang bercanggah, mahkamah tidak mengambilkira kepentingan pihak-pihak. Pertimbangan utama adalah kebajikan kanak-kanak tersebut (lihat perenggan 10).

(4) Laporan pakar psikiatri kanak-kanak menyimpulkan bahawa atas penilaian yang dibuat, bahawa selepas sembilan bulan tinggal bersama keluarga kandungannya, tidak terdapat tanda bahawa kanak-kanak tersebut sedih atau traumatik kerana kanak-kanak tersebut membesar secara normal dari segi fizikal dan psikologi. Tidak terdapat masalah besar kelakuan seperti mimpi ngeri, kencing di atas tilam atau masalah kelakuan; tanda-tanda biasa apabila kanak-kanak berada dalam keadaan sedih (lihat perenggan 18).

(5) Setelah mempertimbangkan laporan sosial yang disediakan oleh Jabatan Kebajikan dan laporan psikiatri kanak-kanak, ia adalah untuk kebajikan kanak-kanak tersebut bahawa dia kekal bersama ibubapa dan adik beradik kandungnya (lihat perenggan 19).]

Notes

For a case on Native Court, see 2 *Mallal's Digest* (4th Ed, 2010 Reissue) para 5078.

For cases on adoption, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2956–2976.

For cases on jurisdiction, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1967–1987.

Cases referred to

Arumugam s/o Seenivasagam v Sinnamah (f) [1959] MLJ 130; [1959] 1 LNS 7, HC (refd)

Legislation referred to

Sabah Adoption Ordinance 1960 s 10
Sabah Native Courts Enactment 1992 s 6

Angela Ubu (Angela Ubu & Associates) for the applicant.
Suzeianah Saulkman (Mahap Jelani & Co) for the respondent.

Stephen Chung JC:

[1] This is an application by the applicants to adopt a child pursuant to s 10 of the Sabah Adoption Ordinance 1960. The natural parents of the child oppose the application and the applicants contend that this is a fit case for the consent of the natural parents to be dispensed with under s 10 of the Ordinance.

[2] The applicants do not have any child of their own and wish to adopt a child. The natural parents have four other children aged between 13 – 18 years old and agreed to give up the child to the applicants for adoption. The child was born on 7 March 2006 at Hospital Likas, Kota Kinabalu. The child was given up to the applicants for adoption on 11 March 2006 pursuant to native customs. The adoption ceremony was carried out at the natural parents' house at Tamparuli and witnessed by two Ketua Kampong according to native customs. Since then the applicants have raised the child as their own.

[3] The facts showed that the natural parents regretted their decision to give up the child for adoption. They said two weeks after giving up the child for adoption they began to ask for the return of the child. The reasons the natural

parents gave up the child to the applicants for adoption were because they were poor and the biological mother was sick at the material times.

[4] They lodged a police report on 26 September 2006 and referred the matter to the Native Court at Tamparuli. The facts showed that the application was heard in the Native Court at Tamparuli on 9 January 2007 in the presence of the applicants and natural parents. The court made an order that the child be returned to his natural parents within 30 days and made other consequential orders regarding compensation to the applicants pursuant to native customs. The facts showed that the natural parents had paid the compensation as ordered by the Native Court but the child was only returned to the natural parents on 17 April 2009.

[5] It was submitted on behalf of the applicants that the Native Court at Tamparuli had no jurisdiction to hear and decide on the application made by the natural parents for the return of the child. It was submitted that the order of the Native Court at Tamparuli was beyond its jurisdiction and was null, void and of no effect. It was submitted that the child should therefore be returned to the applicants.

[6] On behalf of the natural parents it was submitted that in this case the adoption ceremony was according to native customs and the hearing for the return and custody of the child was also according to native law and customs before the Native Court at Tamparuli on 9 January 2007. It was submitted that the applicants were estopped from denying the juridistion of the Native Court. Further, it was submitted that the applicants did not appeal against the decision of the Native Court at Tamparuli to the District Native Court but had returned the child to the natural parents under the order of the Native Court at Tamparuli.

[7] The jurisdiction and powers of the Native Courts in Sabah are set out in s 6 of the Sabah Native Courts Enactment 1992. Section 6(1)(c)(iii) specifically provides that every Native Court shall exercise original jurisdiction to hear, try, determine and dispose of cases involving native law or customs relating to adoption, guardianship or custody of infants, maintenance of dependants and legitimacy.

[8] The first applicant and the natural parents are natives of Sabah. The child is a native of Sabah. The Native Court at Tamparuli has the jurisdiction and power to hear and determine the adoption and custody of the child under the Sabah Native Courts Enactments 1992. The applicants and the natural parents having attended the adoption before the Ketua Kampung at Tamparuli and having attended the hearing in the Native Court at Tamparuli, regarding the adoption, revocation of the adoption and custody of the child according to

native law or customs, are estopped from denying the jurisdiction and power of the Native Court at Tamparuli to adjudicate on the matters in accordance to native law or customs.

[9] The facts showed that the Native Court at Tamparuli had on 9 January 2007 ordered the applicants to return the child to the care and custody of his natural parents but they did not do so. They only did so on 17 April 2009, about 2 years and 3 months later. They had caused unnecessary pains to the natural parents and to themselves by delaying the return of the child.

[10] In an application for adoption where there are conflicting claims, the court is not concerned with the interests of the parties. The paramount consideration is the welfare of the child. I refer to the case of *Arumugam s/o Seenivasagam v Sinnamah (f)* [1959] MLJ 130; [1959] 1 LNS 7 which summarised the laws as follows:

(a) At common law the parent had, as against other persons generally, an absolute right to the custody of the child, unless he or she had forfeited it by certain sorts of misconduct. Certain statutes have been passed, which did limit to some extent the rights of parent, though not guilty of misconduct that would have disentitled him or her to the custody of the child at common law.

(b) The duty of the court is to leave the child alone, unless the court is satisfied that it is for the welfare of the child that some other course shall be taken. The welfare of a child is not to be measured by money only, nor by physical comfort only. The word 'welfare' must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded.

(c) The court has to consider, therefore, the whole of the circumstances of the case, the position of the parent, the position of the child, the age of the child, the religion of the child so far as it can be said to have any religion, and the happiness of the child. Prima facie it would not be for the welfare of a child to be taken away from its natural parent and given over to other people who have not that natural relation to it.

[11] In this case the applicants are married to each other and live in Sipitang, Sabah. The first applicant is a businessman and earns a monthly gross income of RM20,000 whereas the second applicant works as an administration clerk with the Ministry of Education with a monthly income of RM2,300. The applicants in their affidavit said that they have brought up the child as their own and have lavished their love and affection on the child all these years since he was four days old when the child was given to them for adoption. They said

that they and the child have developed a strong bond and that to the child they are his parents since he did not know of his natural parents during these years.

[12] During these years, from 11 March 2006 to 17 April 2009 the applicants said that the natural parents did not visit the child, did not show their love for the child and did not provide any support or care for the child. They contended that the natural parents have abdicated their roles and rights as parents to the child. They also contended that the fact that the natural parents had given up the child for adoption showed that they were not fit to be parents of this child.

[13] It was submitted that it would be disruptive and traumatise the child to transplant the child from his familiar surroundings since child birth to live in a new and unfamiliar surroundings and with new people with whom he is not familiar.

[14] Following this application for adoption pursuant to s 10 of the Ordinance, a social report has been prepared by the Welfare Department dated 17 September 2009. The welfare officer visited the child at the house of the natural parents on 15 September 2009 for the purpose of assessing the child in his new environment. The report stated that the child has bonded and gets on well with his natural parents and siblings as one happy family. The officer found that the child has settled in and adjusted very well to his new environment. During the visit, the officer found the child to be active, playful and talkative and that he was a normal and happy child.

[15] The child was also referred to a consultant child and adolescent psychiatrist at Hospital Mesra, Bukit Padang, Kota Kinabalu for an assessment. The assessments were done on three separate sessions; on 12 January 2010 the child was assessed together with his natural parents and a brother, on 20 January 2010 the child was assessed alone and on 28 January 2010 the child was assessed in the presence of both the natural and adoptive parents, then in the presence of the adoptive parents only.

[16] The child psychiatrist found that the child seemed to be very concerned over his natural mother's emotion when on one occasion, while his mother was relating about their separation, she could not control her emotion and was in tears. Upon seeing her mother crying, the child stopped playing and came forward to hug and comfort her mother.

[17] The child psychiatrist reported that on sessions together with the applicants together with the natural parents, the child was cooperative with all of them together in the room. He sat with the second applicant when she called for him. He seemed to be enjoying the toys brought by the applicants. However

the child preferred to seek help from his natural mother when he was stuck with his toys and interestingly when the second applicant was crying when relating her part of the story, the child moved away from her contradicting what happened when his natural matter cried in the previous session.

[18] The report concluded that on the assessment done, that was after nine months of living with his biological family, there was no indication that the child is in distress or traumatised as he was developing normally both physically and psychologically. There was no report of major behavioral problem like nightmares, bedwettings or behavioural problem: the common presentations when a child was or is in distress.

[19] Having duly considered all the above factors and circumstance including the two reports prepared for the purpose of this application, it is for the welfare of the child that he remains with his biological parents and siblings. Therefore, I dismiss this application for adoption. I make no order as to costs.

Application dismissed with no order as to costs.

Reported by Kanesh Sundrum